the defendants cancelled and voided all pre-existing separate geographical districts for white and Negro pupils applicable to the First Grade in all of the defendants' schools.

"Thereafter these defendants and their predecessors as members of the Board of Directors of the Special School District of Fort Smith have, each year at the commencement of the September term of the schools of the district, likewise desegregated the next highest grade in said schools and cancelled and voided all pre-existing separate geographical districts for white and Negro pupils applicable to each successive higher grade, thus progressing through September, 1963, to full desegregation through the Seventh Grade, abolishing all pre-existing separate geographical districts for white and Negro pupils applicable to Grades One to Seven inclusive.

"Defendants allege that said Plan is in full conformity with the decision of the United States Supreme Court in Brown v. Board of Education, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083; is fully consistent therewith and with the test of 'all deliberate speed' prescribed in said decision under the facts and circumstances then and thereafter and now existing in the community served by the Special School District of Fort Smith; that the administration of said Plan by the defendants as above set forth is in conformity with and not violative of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution as heretofore interpreted

by the Supreme Court of the United States and other Courts of Appeal of the United States.

"That the plaintiffs and the class whom they represent have acquiesced in the administration of said Plan by the defendants as consistent with the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, as interpreted by the courts of the United States, from its inception in 1957 down to the filing of this action.

"That said Plan, as voluntarily adopted and administered by the defendants and their predecessors in office, has proved workable, beneficial and non-discriminatory for all of the patrons of the Fort Smith Special School District and the inhabitants of the community which it serves, regardless of race or color.

"That said Plan is non-discriminatory on the basis of race or color upon its face and as in fact administered by the defendants from September, 1957, down to the present.

"That said Plan as so administered has fostered and promoted harmonious and peaceful relationships [836] between all pupils and patrons of the Fort Smith Special School District and citizens of the community which it serves during the entire period of its operation down to the present, and provides a vehicle by which a transition from a totally segregated to a totally desegregated school system can be accomplished with a minimum of administrative problems.

"That there still exist administrative problems of various natures involved in the continued transition from segregated schools to desegregated schools, some

of which are peculiar to the presently remaining segregated grades Eight through Twelve, which grades the defendants in all good faith intend to continue to desegregate in accordance with the Plan, a grade each year; and a continuance of the Plan in its present form will foster the orderly, peaceful and harmonious solution of such administrative problems. Disruption or material alteration of the Plan at this stage of its progress will aggravate and accentuate the administrative problems confronting the defendants and peculiarly affecting the desegregation of grades Eight through Twelve, and will thereby cause a deterioration and down grading of the educational opportunities that can be afforded by the defendants to all of the patrons of the defendant District over the course of the next five years, to the detriment of all of the students of the defendant District, both Negro and white.

"That the progression of the Plan of desegregation, as adopted and placed in effect by the Special School District of Fort Smith, presently constitutes a desegregation with 'all deliberate speed', in compliance with the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution as interpreted and declared by the United States Courts."

The cause was set for trial on its merits on November 21, 1963, but it developed that facilities for holding court would not be available on that date, and the case was stricken from the trial calendar subject to resetting.

Opinion Dated August 19, 1964

On June 2, 1964, the court fixed June 18, 1964, as the date for a pretrial conference to be held in the Circuit Court room in the Sebastian County Courthouse.

On June 13, 1964, the defendants filed an amendment to their answer in which they referred to the original plan of desegregation that had been voluntarily and unanimously adopted by the defendants and their predecessors and placed in operation upon the commencement of the school term in September 1957. In the amendment the defendants set forth the status of the program under the plan heretofore referred to as carried out in those schools, the attendance areas of which include both white and Negro pupils.

The plan under which the defendants were operating when this suit was filed provided in subsection (b) of numbered paragraph 2:

> "No pupil whose race or color is in the minority in a given school should be required to attend that school. He should be allowed, but not required, to attend the school nearest his home in which his race or color predominates."

The defendants prayed in the amendment to their answer that "in the event the Court rules that the voluntary transfer provisions of the present plan of integration of Fort Smith Special School District and heretofore in effect since September 1957 be violative of any rights of the plaintiffs, that the Court grant the defendants reasonable time in which to promulgate and file with the Court and serve upon the plaintiffs a revised plan for the future continued integration of the schools in the Fort Smith Spe-

cial School District eliminating therefrom the voluntary transfer provisions on the basis of race heretofore in effect; and pray otherwise as in their original Answer."

[837] At the pretrial conference on June 18, 1964, the court held that the action heretofore taken under subsection (b) of numbered paragraph 2 (the voluntary transfer provision) of the original plan of integration is invalid, and that the defendants should have a reasonable time to prepare, serve and file a revised plan of integration. In accordance with such findings the defendants were ordered to prepare, serve and file with the court in a reasonable time a revised plan for the integration of the schools of Fort Smith Special School District.

Also, at the same hearing it was announced that Mr. William M. Eads, Jr., had succeeded the named defendant, Douglas G. Rogers, as a member of the Board of Directors, and the said Eads was substituted as a party defendant.

On July 17, 1964, the defendants in compliance with the pretrial order of June 18 filed and served the revised plan of integration. The plan filed by the defendants consists of nine typewritten pages. It was introduced into evidence, and it seems unnecessary to copy herein the entire plan, but reference will be made herein to the provisions of the proposed plan that are specifically objected to by the plaintiffs.

On July 28, 1964, the plaintiffs filed their response to the revised plan, in which they alleged that the revised plan and the initial plan, under which the defendants have heretofore operated the schools "do not represent a good

faith and prompt effort to desegregate the Special School District of Fort Smith, Arkansas, with all deliberate speed within the meaning of the United States Supreme Court's Mandate in the Brown case." That the revised plan does not offer any benefits to the minor plaintiff, Patricia Rogers, who is now in the 11th grade; that the other named plaintiff, Janice Rogers, graduated from high school during the last school term and did not have an opportunity to enjoy the benefits to be derived from an integrated education,[1] and "if the court should countenance the delay which is advocated by defendants, which plaintiffs assert that defendants have not shown any necessity for such delay, this minor plaintiff also will be denied her rights to an integrated education." That the revised plan makes no provisions for the desegregation of the teaching and administrative personnel in the schools within the Special School District of Fort Smith, Arkansas, all in violation of the Fourteenth Amendment to the United States Constitution. "That the Lincoln attendance area under the proposed reorganization will still be based solely on race, all in violation of the federal Constitution."

The cause was tried to the court on August 10, 1964. The defendant, Chris Corbin, Superintendent of Schools of the Special School District of Fort Smith, Arkansas, called as a witness by defendants, testified at length. By agreement the original plan of integration, appearing as Exhibit A to the original answer and which became effective with the beginning of the school term in September

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[1] Plaintiff Janice Rogers is now enrolled in the Fort Smith Junior College, a completely integrated college.

1957, and the proposed revised plan filed herein on July 17, 1964, were introduced into evidence together with maps of the proposed attendance areas under the proposed and revised plan.

The plaintiffs also called Mr. Corbin as a witness and introduced Exhibits 1 through 8, but it seems unnecessary to set forth such exhibits for the reason that in the opinion of the court they are not helpful in determining the issues raised by the pleadings and the proposed revised plan and the objections of the plaintiffs thereto. These exhibits were introduced by plaintiffs in support of sub-paragraph 9-C of paragraph IV of the specific allegations of the complaint, but they in nowise tend to establish that the defendants have been maintaining and approving budgets making available funds, school construction programs and curricula designed to perpetuate and [838] maintain compulsory racially segregated schools.

The plaintiffs also called as witnesses S. E. Bullock, Principal of Lincoln High School, and the plaintiffs Mrs. Corine Rogers and Miss Patricia Rogers. The plaintiff Mrs. Corine Rogers, mother of Miss Patricia Rogers, testified that she would like for her daughter to be "exposed to an integrated education." The daughter testified that she would like to attend an integrated high school because Negroes are now in competition with white people as well as with Negroes, and she felt that she would have a better chance to succeed by graduating from an integrated high school.

There are 30 schools situate in the defendant District and operated by the defendant Directors. In the school year 1963-64 there was a total of slightly more than 14,000

pupils residing in the District. The average daily attendance of Negro pupils was 1,082 while the average daily attendance of white pupils was 11,423.

The school population prior to World War II had remained practically static for several years, but increased rapidly in the decade of 1940 to 1950. In 1948 the defendant District found it necessary to engage in a huge building program, which program is now practically completed, and all the new buildings will be in operation with the beginning of the school year 1964-65. The District plans to demolish the old Washington elementary school building which has heretofore been attended exclusively by Negroes. The building is antiquated and the other buildings are in excellent condition and the facilities are ample. Under the revised plan the students formerly attending will be transferred to other schools that are predominantly white and located in the attendance area of the residence of the pupils.

At the end of the school year 1962-63 the elementary grades, 1 through 6, had been integrated according to the original plan. At the beginning of the school year 1963-64, the 7th grade was integrated in accordance with the original plan. In the defendant District the elementary grades include 1 through 6, the junior high schools include grades 7 through 9, and the senior high schools include grades 10 through 12.

During the 1963-64 school year white and Negro pupils availed themselves of the provisions for voluntary transfer contained in the original plan heretofore set forth, and the record discloses that a total of 323 white pupils voluntarily transferred from schools to which they had been assigned situated in their residential areas to vari-

ous other schools. During the same time 214 Negro pupils transferred from schools located in their residential areas to other schools that were predominantly Negro. Only 39 Negro pupils were enrolled and attended a predominantly white school during that school year, and no white pupils were enrolled or attended a school that was predominantly Negro. If the original plan had not contained the voluntary transfer provision, there would have been approximately 170 Negro pupils required to attend schools that were predominantly white and approximately 100 white students would have been required to attend schools that were predominantly Negro.

It will be observed from statements heretofore made that the pupils of both races availed themselves of the provisions of the original plan for voluntary transfer. It seems clear that the great majority of pupils, white and Negro, do not desire to attend an integrated school.

On June 3, 1963, the Supreme Court handed down the opinion in Goss v. Board of Education, 373 U. S. 683, 83 S. Ct. 1405, 10 L. Ed. 2d 632, in which the court held that similar voluntary transfer provisions in a plan were void and unconstitutional. The court, in discussing the transfer provision under consideration in that case, beginning at page 686 of 373 U. S., at page 1408 of 83 S. Ct., said:

> "It is readily apparent that the transfer system proposed lends itself to perpetuation of segregation. Indeed, the provisions can work only [839] toward that end. While transfers are available to those who choose to attend school where their race is in the majority, there is no provision whereby a student might trans-

fer upon request to a school in which his race is in a minority, unless he qualifies for a 'good cause' transfer. As the Superintendent of Davidson County's schools agreed, the effect of the racial transfer plan was 'to permit a child [or his parents] to choose segregation outside of his zone but not to choose integration outside of his zone.' Here the right of transfer, which operates solely on the basis of a racial classification, is a one-way ticket leading to but one destination, i.e., the majority race of the transferee and continued segregation. This Court has decided that state-imposed separation in public schools is inherently unequal and results in discrimination in violation of the Fourteenth Amendment. Brown v. Board of Education of Topeka, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). Our task then is to decide whether these transfer provisions are likewise unconstitutional. In doing so, we note that if the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition of the school to which he requested transfer we would have an entirely different case. Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations, to remain in the school of their zone or to transfer to another."

At page 689 of 373 U. S., at page 1409 of 83 S. Ct. the Court said:

" • • • The transfer provisions here cannot be deemed to be reasonably designed to meet legitimate local problems, and therefore do not meet the require-

ments of Brown. Accordingly, the decisions of the Court of Appeals, insofar as they approve the transfer provisions submitted by the boards of education of Knoxville, Tennessee, and Davidson County, Tennessee, are reversed and the cases are remanded to the Court of Appeals with directions to remand to the District Courts for further proceedings in accordance with this opinion."

When that decision was announced the defendant Directors began consideration of an amendment to their integration plan under which the schools had been operated since the beginning of the school term in 1957. On September 9, 1963, three months and six days after the release of the opinion in the Goss case, the plaintiffs commenced the instant action. As a result of the order of this court entered June 18, 1964, the defendants asked and were granted permission to serve and file a plan for integration as a substitute for the original plan. In the revised plan the defendant Board of Directors stated that their predecessors announced in 1956 their intention to integrate the District schools in accordance with the Brown decision. The Board at that time recognized that there were a number of factors that were required to be taken into consideration in arriving at a satisfactory solution of the problem and in formulating a plan for integration agreeable to constitutional principles. In the revised plan the defendants stated:

"This Board recognizes that these same elements must still, in varying degrees, be taken into account

in revising the present plan. A revised plan must meet the mandate of the courts as laid down in later decisions.

"The Board reaffirms its former position to endeavor to effect a constitutional solution of the problem. As a part of its revised plan of integration it re-adopts the policies that it used as a basis for the original approach to the matter in 1956. Inasmuch as any revised plan must take into account the progress that has already been made, and inasmuch as the sufficiency of a revised [840] plan must be determined in the light of the experience heretofore gained, the Board feels the the original declaration of the Board establishing the policy and Plan of Integration should be re-stated and incorporated into this revision:"

Then follows a restatement of the policy, and after restating such policy the defendants set forth that subsequent decisions of the Supreme Court and other appellate courts require a modification of the present plan of integration, but that these modifications do not require that the policy of the Board be changed inasmuch as the announced policy on integration is consistent with and broad enough to be a basis of a revised plan that will in the judgment of the Board be adequate. Continuing the defendants said:

"As a result of the original Plan of Integration the Special School District of Fort Smith, Arkansas, will enter the eighth year of its plan for voluntary integration at the beginning of the 1964-65 school year. In accordance with this present plan of voluntary integration grades 1 through 8 will be integrated at the be-

ginning of the 1964-65 school term. The Revised Plan of the Board provides to continue to integrate the school system one grade at a time as it has heretofore done."

The Board of Directors then deals with the schools in the "elementary level" and in the "secondary level." Without doubt, in a District the size of the defendant District the most approved and efficient plan calls for a division of the schools in what school men term the "6-3-3" plan of operation, which is to say that the first six grades should be classified as elementary, the next three grades as junior high, and the last three grades as senior high. The revised plan clearly outlines the changes necessary to put such a classification in effect, and it is necessary to create new junior high school attendance areas in order to take full advantage of the new system and as required by the huge building program hereinbefore referred to. The plan further provides:

"Under the revised plan of integration the Board will continue to integrate at the secondary level one grade at a time. During the 1964-65 school year grade eight will be integrated at the junior high school level. This will result in 197 Negro pupils being integrated in previously all white junior high schools.

"'Complying with the Court's direction, the Board directs the discontinuance of the practice of voluntary transfer as provided in the original plan of integration. Any transfer either voluntary or involuntary of a pupil from one secondary school district to another

must be done hereafter for reasons that appear adequate to the administration, which reasons are neither based upon nor influenced by race or color."

The plaintiffs contend that the revised plan of integration and defendants' initial plan of integration "do not represent a good faith and prompt effort to desegregate the Special School District of Fort Smith, Arkansas, with all deliberate speed within the meaning of the United States Supreme Court's Mandate in the Brown case." They also argue that there has been too much deliberation and not enough speed.

When the actions of the School Board from 1956 to the present time are considered, along with the many decisions of the Supreme Court and the appellate courts, it is difficult for this writer to understand why such contentions would be made. There have been and is now an exceptionally harmonious and cooperative relationship between the races in Fort Smith, Arkansas. Integration is an accomplished fact, and certainly the School District, acting through its Directors, made "a prompt and reasonable start towards compliance with the Brown decision."

In Brown v. Board of Education, (1955) 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, the court, beginning at page [841] 300 of 349 U. S., at page 756 of 75 S. Ct., said:

> " * * * Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.

To that end, the courts may consider problems related to administration, arising from the physical condition of the school plan, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system."

The plaintiffs cited and seem to rely upon the case of Watson v. City of Memphis (1963) 373 U. S. 526, 83 S. Ct. 1314, 10 L. Ed. 2d 529, in their broadside assault upon the revised plan, but the court, beginning at page 531 of 373 U. S., at page 1318 of 83 S. Ct., said:

"This case presents no obvious occasion for the application of Brown. We are not here confronted with attempted desegregation of a local school system with any or all of the perhaps uniquely attendant problems, administrative and other, specified in the second Brown decision as proper considerations in weighing the need for further delay in vindicating the Fourteenth Amendment rights of petitioners. Desegregation of parks and other recreational facilities does not present the same kinds of cognizable difficulties inhering in elimination of racial classification in schools, at which attendance is compulsory, the adequacy of teachers and

facilities crucial, and questions of geographic assignment often of major significance."

In Aaron v. Cooper, (8 Cir. 1957) 243 F. 2d 361, the court had under consideration a judgment of the District Court for the Eastern District of Arkansas, 143 F. Supp. 855 (1956), in which the District Court approved a plan of integration promulgated and adopted by the Board of Directors of the Little Rock School District. The trial court at page 864 of 143 F. Supp. said:

"* * * The primary responsibility for the implementation of the constitutional principles announced in the May 17, 1954, decision, Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, is upon the school authorities. It is the duty of the school authorities to solve the many and varied local problems. Because of the nature of the problems and the local conditions the school authorities often find that action taken by other school districts is inapplicable to the facts with which they are dealing. It is not the duty or function of the federal courts to regulate or take over and operate the public schools. That is still the duty of the duly state-created school authorities, but the free public schools must be maintained and operated as a racially nondiscriminatory system. During the period of transition from a segregated to a nonsegregated system the school authorities must exercise good faith. They must consider the personal rights of all qualified persons to be admitted to the free public schools as soon as practicable on a nondiscriminatory basis. The public interest must be considered along

with all the facts and conditions prevalent in the school district. Educational standards should not be lowered. If the school authorities have acted and are proceeding in good faith, their actions should not be set aside by a court so long as [842] their action is consistent with the ultimate establishment of a non-discriminatory school system at the earliest practicable date."

The Court of Appeals, in affirming the judgment of the District Court, beginning at page 363 of 243 F. 2d, said:

"Appellants cite to us several cases where Federal Courts have used their injunctive powers to speed up or effectuate integration. Willis v. Walker, D. C. W. D. Ky. 1955, 136 F. Supp. 177; Thompson v. County School Board of Arlington County, D. C. E. D. Va. 1956, 144 F. Supp. 239; Clemons v. Board of Education, 6 Cir., 1956, 228 F. 2d 853, certiorari denied 1956, 350 U. S. 1006, 76 S. Ct. 651, 100 L. Ed. 868; Booker v. State of Tennessee Board of Education, 6 Cir., 1957, 240 F. 2d 689. These decisions serve only to demonstrate that local school problems are 'varied' as referred to by the Supreme Court. A reasonable amount of time to effect complete integration in the schools of Little Rock, Arkansas, may be unreasonable in St. Louis, Missouri, or Washington, D. C. The schools of Little Rock have been on a completely segregated basis since their creation in 1870. That fact, plus local problems as to facilities, teacher personnel, the creation of teachable groups, the establishment of the

proper curriculum in desegregated schools and at the same time the maintenance of standards of quality in an educational program may make the situation at Little Rock, Arkansas, a problem that is entirely different from that in many other places. It was on the basis of such 'varied' school problems that the Supreme Court in the second Brown decision remanded the cases there involved to the local District Courts to determine whether the school authorities, who possessed the primary responsibility, have acted in good faith, made a prompt and reasonable start, and whether or not additional time was necessary to accomplish complete desegregation. The question of speed was to be decided with reference to existing local conditions."

Throughout the proposed revised plan the Board refers only to elementary and secondary schools for the reason that the "6-3-3" program cannot be inaugurated and effectively followed until there have been some necessary changes made, as set forth in the provisions of the revised plan, and in discussing those revisions the Board has referred to both junior high and senior high as schools of the secondary level, but when the revised plan is in operation, the Board states:

"In order to accomplish reorganization of the secondary schools the Board has established a transition period during the 1964-65 school year. Northside High School will house grades 10, 11 and 12. Southside Junior-Senior High School will house grades 9, 10 and 11 during the transition year. Lincoln will include grades 9, 10, 11 and 12 during the school year 1964-

65 and 10, 11 and 12 beginning with the school year 1965-66."

The plaintiffs made no contention as to the provisions of the revised plan which provides that in the interest of maintaining and insuring "quality education for all pupils" that the revised plan, insofar as the Howard Elementary School, the Dunbar Elementary School and the Washington Elementary School are concerned, shall not apply until the beginning of the school year 1965-66 for the reasons set forth in numbered paragraph 3-A, B and C of the revised plan.

The plaintiffs further contend that the revised plan is unconstitutional because under it teachers, principals and other administrative personnel of the high schools may be assigned on the basis of their race and color and on the basis of the race and color of the pupils which will be to the detriment of the plaintiffs and the members of the class of persons they represent.

In this connection, the defendants in their original answer filed October 7, [843] 1963, moved to strike sub-paragraph 9-D of Paragraph IV, which is the paragraph where the plaintiffs voice their objection to the plan because of the manner of providing for the assignment of teachers and other administrative personnel.

The court in the pretrial conference stated that the sub-paragraph would not be stricken for the reason that it might become material and require consideration if the question was raised by proper parties, and relying upon Mapp v. Board of Education of City of Chattanooga (6 Cir. 1963) 319 F. 2d 571, the court sustained an objection

to the introduction of evidence by plaintiffs on the question of the assignment of teachers, but in order to avoid a multiplicity of suits, the court will retain jurisdiction of the case in order that the question may be raised if any proper party desires to intervene.

At the close of the introduction of testimony the plaintiffs orally moved the court that they should recover their costs and a reasonable attorney's fee, and in support thereof have cited to the court the case of Bell v. School Board of Powhatan County, Va., (4 Cir. 1963) 321 F. 2d 494; Local No. 149 I. U., U. A., A. & A. I. W. v. American Brake Shoe Co., (4 Cir. 1962) 298 F. 2d 212; Rolax v. Atlantic Coast Line R. Co., (4 Cir. 1951) 186 F. 2d 473; and Buckner v. County School Board of Green County, (4 Cir. 1964) 332 F. 2d 452.

The court has examined all of the cases relied upon by plaintiffs in support of their motion for allowance of attorney's fees. Bell, supra, the court, in considering the question of allowance of attorney's fees in a school integration case, announced what this court believes to be the correct rule at page 500 of 321 F. 2d:

> " * * * The general rule is that the award of counsel fees lies within the sound discretion of the trial court but, like other exercises of judicial discretion, it is subject to review. The matter must be judged in the perspective of all the surrounding circumstances. Local 149, U. A. W. v. American Brake Shoe Co., 298 F. 2d 212 (4th Cir.), cert. denied, 369 U. S. 873, 82 S. Ct. 1142, 8 L. Ed. 2d 276 (1962). Here we must take into account the long continued pattern of eva-

> sion and obstruction which included not only the defendants' unyielding refusal to take any initiative, thus casting a heavy burden on the children and their parents, but their interposing a variety of administrative obstacles to thwart the valid wishes of the plaintiffs for a desegregated education. To put it plainly, such tactics would in any other context be instantly recognized as discreditable. The equitable remedy would be far from complete, and justice would not be attained, if reasonable counsel fees were not awarded in a case so extreme. See Rolax v. Atlantic Coast Line R. Co., 186 F. 2d 473, 481 (4th Cir. 1961) (Parker, C.J.); cf. Vaughan v. Atkinson, 369 U. S. 527, 530-531, 82 S. Ct. 997, 8 L. Ed. 2d 88 (1962)."

Certainly the facts in the instant case do not justify the allowance of an attorney's fee to the plaintiffs, and therefore their motion should be overruled.

The facts reflect that the Directors and administrators of the school affairs of the defendant District have since 1956 been diligent in their efforts to integrate the schools as required by the decisions of the courts. The administration of the plan has been eminently successful and satisfactory. It has been accepted by the majority of pupils and parents as the best method of complying in good faith with the law. When the defendants discovered that the voluntary transfer provisions in the original plan was unconstitutional, they began to do something about it. Prior to the decision in the Goss case, the defendants were moving with all deliberate speed to make some necessary changes in the attendance areas in order to utilize all

the facilities of the District and to guarantee every child of school age the full enjoyment of his or her constitutional rights. In order to insure the attainment of that objective a plan had to be followed. It has [844] been followed for seven years, and under the proposed revised plan full and complete integration will be accomplished, and in order to insure such a result and the full implementation of the constitutional principles, the Directors and school authorities should not be deprived of the exercise of their sound discretion in the discharge of their primary responsibility for "assessing and solving the problems that confront them."

The revised plan should be approved, and judgment is being entered today, approving and confirming the revised plan as filed herein on July 17, 1964; retaining jurisdiction of the cause for a decision of any question that might arise as to the assignment of teachers and principals, but not to any other personnel, if presented by proper parties; dismissing the complaint of the plaintiffs except as to subparagraph 9-D of paragraph IV; and providing that the parties hereto shall pay their own costs.

Judgment

On August 10, 1964, this cause came on for trial to the court, without the intervention of a jury, the plaintiffs appeared by Mr. George Howard, Jr., their attorney, and the defendants appeared by Mr. J. S. Daily and Mr. Bruce H. Shaw, their attorneys.

Evidence on behalf of the parties was presented and, at the conclusion thereof, the case was submitted and taken under advisement by the court.

Now, having considered all the evidence adduced at the trial of this cause and all the pleadings herein, the court has prepared and filed its opinion herein, and in accordance therewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendant's Revised Plan of Integration, filed herein on July 17, 1964, be and hereby is approved and confirmed; that the court retain jurisdiction of the cause for a decision on any question that might arise as to the assignment of teachers and principals, but not as to any other personnel, if presented by proper parties; that the complaint of the plaintiffs, except as to subparagraph 9-D of paragraph IV, be and is dismissed and the parties hereto shall pay their own costs.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff's motion for allowance of attorney's fees be and hereby is overruled.

This August 19, 1964.

JOHN E. MILLER
United States District Judge

[117]

Opinion Dated May 7, 1965

UNITED STATES COURT OF APPEALS

EIGHTH CIRCUIT

No. 17870.

345 F. 2d 117

JANICE ROGERS, a Minor, Age 16, PATRICIA ROGERS, a Minor, Age 15, by Their Mother and Next Friend, MRS. CORINE ROGERS,

Appellants,

—v.—

DR. EDGAR F. PAUL, DR. ROGER BOST, JOHN M. YANTIS, BRUCE SHAW, JACK GROBER, DOUGLAS G. ROGERS, Board of Directors of Special School District of Fort Smith, Arkansas; CHRIS CORBIN, Superintendent of Schools of Special School District of Fort Smith, Arkansas; SPECIAL SCHOOL DISTRICT OF FORT SMITH, ARKANSAS, a Corporation,

Appellees.

[118] Derrick A. Bell, Jr., New York City, made argument for appellants and filed brief with Jack Greenberg and John W. Walker, New York City, and George Howard, Jr., Pine Bluff, Ark.

Bruce H. Shaw, of Shaw, Jones & Shaw, Fort Smith, Ark., made argument for appellees and filed brief with John S. Daily, of Daily & Woods, Fort Smith, Ark.

Opinion Dated May 7, 1965

Before:

VOGEL, MATTHES and MEHAFFY,
Circuit Judges.

MATTHES, Circuit Judge.

In Goss v. Board of Education, 373 U. S. 683, 83 S. Ct. 1405, 10 L. Ed. 2d 632, decided June 3, 1963, the Supreme Court held unconstitutional so-called voluntary transfer provisions incorporated in the formal desegregation plans adopted by the school boards of the Knoxville, Tennessee and the Davidson County, Tennessee School Districts. In the desegregation plan adopted by the school board of the Special School District of Fort Smith, Arkansas, a voluntary transfer provision was incorporated under which any student, upon request, was permitted, solely on the basis of his own race and the racial composition of the school to which he was assigned by virtue of the attendance area in which he resided, to transfer from such school, where he would be in racial minority to the school in which his race or color predominated.

Approximately three months after Goss was decided, Mrs. Corine Rogers, a Negro parent, filed this suit in behalf of her two minor daughters, Janice, then 16, and Patricia, then 15, and in behalf of all other Negro minors within the Special School District of Fort Smith, Arkansas, who are similarly situated because of race and color. She sought to enjoin the school board members and the District Superintendent, defendants in the action, from maintaining and operating segregated public schools in such district. Janice graduated from the twelfth grade upon completion

of the 1963-1964 school term, and as to her the issues presented by this litigation are now moot. Patricia will enter the last year of high school with the advent of the 1965-1966 school year.

The allegations of the complaint upon which plaintiffs (hereinafter designated as appellants) premise their right to relief appear verbatim in the District Court's opinion (Judge John E. Miller), 232 F. Supp. 833 (1964) and need not be fully restated herein. It is sufficient to recall that appellants alleged that defendants (hereinafter sometimes designated as appellees) were maintaining and operating segregated high schools for the minor appellants and the members of the class they represent; were maintaining and operating the voluntary transfer system for assignment of pupils; were maintaining and approving budgets, programs and curricula designed to perpetuate and maintain compulsory racially [119] segregated schools; and were assigning principals, teachers, and administrative personnel to the various high schools on the basis of their race and color, all in violation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

At a pretrial conference held after the issues had been joined, the Court ruled that the voluntary transfer provision was invalid and granted appellees a reasonable time to file a revised plan of integration. On July 17, 1964, appellees, in compliance with the Court's order, filed a revised plan which also came under attack by appellants.

After a trial on August 10, 1964, the Court, on August 19, 1964 filed its opinion, and entered judgment approving and confirming the revised plan of integration. The Court,

however, retained jurisdiction of the cause for a decision "of any question that might arise as to the assignment of teachers and principals."

We revert now to the original desegregation plan, the circumstances attending its adoption, its effect upon segregation, and to other pertinent facts and circumstances.

Following Brown v. Board of Education, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), the Board of the Special School District of Fort Smith, pursuant to voluntary action on its part, announced a policy on integration of the Fort Smith public schools. The policy was enunciated in a plan which was formulated and adopted by the Board in 1956. The plan became effective at the beginning of the 1957-1958 school year, provided for the desegregation of one grade each year commencing with the first grade and progressing through the twelfth grade, and as noted, had incorporated therein the voluntary transfer provision.

There are now 30 schools in the District. In the 1963-1964 school year the total school population was slightly in excess of 14,000. The average daily attendance of Negro pupils was 1,082, and the average daily attendance of white pupils was 11,423. In that same school year 39 Negro pupils were enrolled in and attended predominantly white schools. It appears that pupils of both races took advantage of the voluntary transfer provision. Thus, by way of illustration, in the 1963-1964 year 323 white pupils and 214 Negro pupils transferred from schools located in their residential areas, which they were at liberty to attend, to other schools where their race predominated. The Superintendent testified without contradiction, that if the voluntary transfer provision had not been utilized there would have been 150 to

170 Negro pupils attending predominantly white elementary schools in the 1963-1964 year, and approximately 100 white students would have attended predominantly Negro schools in the same school year. The facts in regard to the transfer issue caused Judge Miller to observe "It seems clear that the great majority of pupils, white and Negro, do not desire to attend an integrated school." 232 F. Supp. at p. 838.

The revised plan readopted what may appropriately be referred to as the geographic school zoning system. The voluntary transfer provision was eliminated. Under the plan "all pupils will be assigned to the elementary school district in which they reside, without regard to race." However, there was excepted from the plan's operation for a period of one year the following three elementary school attendance areas having a predominantly Negro population: Howard Elementary School, having a ratio of approximately 55 white pupils to 530 Negro pupils; Dunbar Elementary School, having a ratio of approximately 22 white pupils to 60 Negro pupils; and Washington Elementary School, having a ratio of approximately 30 white pupils to 70 Negro pupils. The exception was made to permit pupils residing in the three named attendance areas to resort to the voluntary transfer provision for the stated period of one year.[1]

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[1] In justification of the exception, the Board stated that there "would be an intense psychological impact in the assigning of a minority of White pupils to previously all Negro elementary schools. * * * The Board feels that its good faith in formulating this Revised Plan cannot be challenged because of this element of delay in connection with these three schools when consideration is given to the fact that this revised plan will result in the im-

[120] The revised plan provides that integration was to continue on the basis of a grade each year until complete integration through the twelfth grade has been accomplished. Thus, under the plan the eighth grade was integrated during the 1964-1965 school year and four additional years will be required to fully integrate all grades.

Provisions in the revised plan, not found in the original one, are designed to effect reorganization and establish the 6-3-3 system so as to provide a basic six-year elementary school program, a three-year junior high school program, and a three-year senior high school program commencing in September 1965.[2]

The plan also contemplates a reorganization of the secondary schools in a manner that will better serve the

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mediate integration of more than 106 Negro pupils into the predominantly White elementary schools upon the Court's approval of this Revised Plan.

"(b) Because of the state of repair and the generally poor physical condition and inadequacy of facilities at Washington Elementary School, this school will be discontinued by the beginning of the 1965-66 school year. At that time and beginning with the 1965-66 school year, the Negro pupils within the present attendance area of Washington Elementary School will be assigned to the Sutton Elementary School and the Spradling Elementary School.

"(c) Beginning with the school year 1965-66 the Howard Elementary School and the Dunbar Elementary School will continue upon a fully integrated basis."

We assume that the one year moratorium applicable to the three named elementary schools will end with the termination of the 1964-1965 school year, and that grades one through nine will be integrated during the 1965-1966 school year.

[2] The plan designates the schools in which the reorganization will be accomplished. We deem it unnecessary to burden this opinion with an analysis of the plan in this regard.

community and meet the educational needs of the pupils. It is expressly provided that "Any transfer either voluntary or involuntary of a pupil from one secondary school district to another must be done hereafter for reasons that appear adequate to the administration, which reasons are neither based upon nor influenced by race or color."

The foregoing background facts bring us to the issues presented in this appeal. We will advert to other pertinent facts during our consideration and discussion of the contentions of the parties.

Summarily stated, appellants contend that the District Court erred in approving the revised plan for the reasons: (1) it unreasonably delays total desegregation for four years; (2) it unreasonably subjects the minor appellants and other Negroes similarly situated to an inferior as well as segregated education and prevents Patricia Rogers from attending the predominantly white Northside High School; (3) it deprives the minor appellants and other Negroes similarly situated of their constitutional right to instruction by teachers assigned without regard to race. The fourth and final contention brings into issue the refusal of the trial court to allow reasonable attorney's fees to appellants for the prosecution of this litigation.

We pause to observe that appellants do not attack or challenge the validity of the geographic school zoning system embraced by the revised plan. Neither is there any hint or suggestion of intentional gerrymandering of the school zones so as to confine one race to attendance at a particular school as was the situation in Taylor v. Board of Education of City School District of New Rochelle, 294 F. 2d 36 (2 Cir. 1961), cert. denied 368 U. S. 940, 82 S. Ct.

382, 7 L. Ed. 2d 339 (1961). Thus, we have here a case where the primary and basic complaint is that the school board has moved too deliberately and with insufficient speed in bringing about desegregation of all of the grades in the Fort Smith system. What appellants are obviously desirous of [121] accomplishing by this litigation is desegregation of grades nine through twelve by the beginning of the 1965-1966 school term.

Before turning to an evaluation of the original desegregation plan, its revision, and the Board's actions relating thereto, we deem it appropriate to again briefly review the pertinent criteria to be considered in resolving the issues presented.

In the second Brown case, the Supreme Court stated:

> "* * * [T]he courts will require that the defendants [Board] make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be

necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system * * *." 349 U. S. at pp. 300-301, 75 S. Ct. at p. 756.

Since Brown the time available for making the transition from a segregated to a desegregated school system has decreased and the emphasis on local problems has been reduced. See Watson v. City of Memphis, 373 U. S. 526, 83 S. Ct. 1314, 10 L. Ed. 2d 529 (1963); Goss v. Board of Education, 373 U. S. 683, 83 S. Ct. 1405 (1963); Griffin v. County School Board of Prince Edward County, 377 U. S. 218, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964); Calhoun v. Latimer, 377 U. S. 263, 84 S. Ct. 1235, 12 L. Ed. 2d 288 (1964). In Goss, supra, 373 U. S. at p. 689, 83 S. Ct. at p. 1409, the Court enunciated the context in which desegregation plans must be judged:

"* * * Indeed, it was consideration for the multifarious local difficulties and 'variety of obstacles' which might arise in this transition that led this Court eight years ago to frame its mandate in Brown in such language as 'good faith compliance at the earliest practicable date' and 'all deliberate speed.' Brown v. Board of Education, 349 U. S., at 300, 301, 75 S. Ct. at 756 [753]. Now, however, eight years after this decree was rendered and over nine years after the first Brown decision, the context in which we must interpret and apply this language to plans for desegregation has been significantly altered."

Delay issue.

[1] Although appellants do not expressly or impliedly assert that the revised plan is the product of or motivated by *actual* bad faith on the part of the Board members and Superintendent, they do assert, in effect, that the failure of the plan to provide for complete desegregation without further delay constitutes lack of good faith as a matter of law within the teachings of the Supreme Court in the Brown cases, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873; 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, and the subsequent cases in which the Supreme Court expounded the Brown mandate. Thus, they argue that "there is no reason to prolong for another four years a procedure which practically and constitutionally can be accomplished in one."

Similar assertions made below were treated by Judge Miller in this language: "[w]hen the actions of the School Board from 1956 to the present time are considered, along with the many decisions of [122] the Supreme Court and the appellate courts, it is difficult for this writer [Court] to understand why such contentions would be made. There have been and is now an exceptionally harmonious and cooperative relationship between the races in Fort Smith, Arkansas. Integration is an accomplished fact,[3] and certainly the School District, acting through its Directors, made 'a prompt and reasonable start towards compliance with the Brown decision.'" 232 F. Supp. at p. 840.

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[3] Appellants acknowledge in their brief that "[a] private Junior college and the Catholic schools are integrated as are the local hotels, movie theatres, skating rinks, bowling alleys and the swimming pool."

This determination is factually sound and was not induced by an erroneous concept of the controlling legal principles. The integration plan adopted by the school board without compulsion, when evaluated in light of local conditions and administrative hurdles, convinces us that not only did the school board make a "prompt and reasonable start toward full compliance," but that desegregation has in fact moved forward with "all deliberate speed."

But appellants argue further that there was no showing of valid administrative problems justifying prolonging of complete desegregation for four additional years. We do not so read the record. Both appellants and appellees were satisfied to rely mainly on the testimony of the Superintendent of Schools of the Special School District of Fort Smith.[4] His testimony in substance was that since the voluntary adoption of the desegregation plan in 1956, the Board has continuously been confronted with administrative problems arising out of: (a) school population growth and inadequacy of buildings and other facilities; (b) mass shifting within the District of School population from the older sections of Fort Smith to new suburban areas; (c) the huge building program entailing an expenditure of approximately $10,000,000; and (d) the transition of all of the schools into a regular 6-3-3 system. The Superintendent further stated that to require immediate desegregation of the four remaining grades would give rise to

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[4] We note that appellants' case consisted of the Superintendent of Schools of the Special School District, the Principal of Lincoln High School and two of the appellants, Mrs. Corine Rogers and Patricia Rogers. Only the Superintendent of Schools testified on behalf of appellees.

additional administrative problems and would greatly hamper what has to date been an orderly desegregation of the schools. That the Superintendent was qualified to express the foregoing opinion can hardly be gainsaid. He had been in the Fort Smith school system for 24 years as a principal, 4 years as assistant superintendent, and 10 years as Superintendent. His uncontradicted testimony supports the conclusion that to compel immediate and complete integration would needlessly thwart the good faith efforts of the Board to accomplish de jure desegregation in a peaceful and orderly manner.

In further support of their contention that the Board has not gone forward with all deliberate speed, appellants make reference to recent Third, Fourth, Fifth and Sixth Circuit decisions which require school boards to desegregate all grades within no more than four to six years in lieu of the twelve year grade-a-year plans. A cursory examination of these authorities reveals one unavoidable and most significant factual dissimilarity with the facts presented in this appeal. Among other important factual variances, every case involved situations where the school boards had either failed to act in good faith or after inordinate delays had proposed a plan which was too slow and unduly protracted the process of desegregation. The courts were there confronted with proposed desegregation plans of the grade-a-year variety which were to commence from 5 to 10 years after the Supreme Court's first disposition [123] of the Brown case in 1954. In Evans v. Ennis, 281 F. 2d 385 (3 Cir. 1960), in the Fall of 1959 (5 years after Brown); Jackson v. School Board of City of Lynchburg, Virginia, 321 F. 2d 230 (4 Cir. 1963); in the Fall of 1962 (8 years after Brown); Bush v. Orleans Parish School Board, 308 F. 2d 491 (5 Cir. 1962),

the revised plan in the Fall of 1962 (8 years after Brown); Gaines v. Dougherty County Board of Education, 334 F. 2d 983 (5 Cir. 1964), in the Fall of 1964 (10 years after Brown); Stell v. Savannah-Chatham County Board of Education, 333 F. 2d 55 (5 Cir. 1964), cert. denied, Roberts v. Stell, 379 U. S. 933, 85 S. Ct. 332, 13 L. Ed. 2d 344 (1965); Armstrong v. Board of Education of Birmingham, 333 F. 2d 47 (5 Cir. 1964), in the Fall of 1963 (9 years after Brown); Goss v. Board of Education of the City of Knoxville, 301 F. 2d 164 (6 Cir. 1962), reversed on other grounds, 373 U. S. 683, 83 S. Ct. 1405, 10 L. Ed. 2d 632 (1963), in the Fall of 1960 (6 years after Brown); Lockett v. Board of Education of Muscogee County, 342 F. 2d 225 (5 Cir. 1965), and Bivins v. Board of Public Education and Orphanage, 342 F. 2d 229 (5 Cir. 1965), in the Fall of 1964 (10 years after Brown).

Desegregation of the Fort Smith public schools stands out in bold contrast to desegregation efforts in some biracial districts where there was hard core opposition to any semblance of integration. See e. g. Griffin v. County School Board, 377 U. S. 218, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964) for history of desegregation efforts in Prince Edward County, Virginia. In Fort Smith the transition was smooth and without incident. There was no manifestation of bad feeling or violent opposition. The lack of any evidence to indicate any serious objection to the plan of desegregation is impressive. So far as this record is concerned, both races are satisfied with the revised plan. It has been accepted by the majority of pupils and parents as the best method of complying in good faith with the law. To be sure, the original plan contained the voluntary transfer

provision which was struck down by the Supreme Court as violative of the constitutional rights of the Negro children. But this defect was eliminated without unreasonable delay, and full integration is now assured. Nearly one-third or approximately 300 of eligible Negro children attended schools having a predominantly white population in the current, 1964-1965 school year, and obviously the number will increase each of the four remaining years as integration moves forward. We are convinced, as was the able, understanding and discerning trial judge, that the administration of the plan has been eminently successful and satisfactory, and that the members of the Board and other school authorities should not be deprived of the right to exercise their sound discretion in discharging their primary responsibility for "assessing and solving the problems that confront them." Brown, supra.

Subjugation to inferior and segregated education issue.

[2] In support of their efforts to bring about full and immediate desegregation, appellants contend that Patricia Rogers[5] and other Negro high school students similarly situated are subjected to an inferior as well as segregated education. More specifically, we are requested to direct the entry of an order permitting Patricia to transfer from Lincoln High School to Northside High School for the 1965-1966 school year in order that she may avail herself of an integrated education and be permitted to obtain instruc-

[5] As we have seen, Janice Rogers graduated from Lincoln High School in 1964. The record shows that she is presently attending the Fort Smith Junior College which is completely desegregated.

tion in journalism, music, and German, which are unavailable at Lincoln. In regard to the alleged inferior education available to Negro students, the Superintendent testified without contradiction that the Lincoln High School [124] facilities have been regularly improved;[6] and there exists an equal apportionment of teachers per pupil throughout the three high schools;[7] that the per pupil operating cost for Lincoln was greater than the largest white high school;[8] and that "Lincoln High School has been accredited by the North Central Association since 1924, before that it was accredited by the Southern Association, and it meets fully the requirements of the students under requirements of the North Central Association for full accreditation." Additionally, the Superintendent stated:

> "* * * you try to step up a curriculum based on the size and what the pupils request in the school. We have told all of our high schools, all three of them, that we would offer *any* course requested if there are as many as six students that want the course and we

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[6] In reviewing the improvements of the Negro schools he stated: "At Lincoln High School, dropping back to the beginning of our building program, back about the 1948 to 1950 era, we built a new shop building there and did considerable renovation on the old building, and then about two years ago we built a new gymnasium and a new classroom wing, so there has been considerable improvement."

[7] The predominantly white Northside and Southside High Schools have approximately 85 teachers for 2300 students and 40 teachers for 1000 students, respectively; Lincoln High School has 21 teachers for less than 500 students.

[8] During the 1962-1963 school year the per pupil operating cost at Northside was $269.00 per pupil; at Lincoln it was $288.00 per pupil.

> can find a teacher to teach it. Lincoln High School and Northside High School have been North Central accredited High Schools, the same length of time, I believe since 1924. The Southside High School is not accredited by the North Central Association at the present time. Therefore the offerings in each school are based on what the students want in the school."

This record provides no basis or warrant for an order directing the Board to transfer Patricia Rogers from Lincoln to Northside High School for the 1965-1966 school year. True, in Jeffers v. Whitley, 309 F. 2d 621, 629 (4 Cir. 1962) and Board of Education of St. Mary's County v. Groves, 261 F. 2d 527, 529 (4 Cir. 1958) immediate relief was granted to individual plaintiffs; however, unlike here, in those districts the geographic school zoning system had not been adopted. We observe that in Jeffers, supra, at fn. 11, p. 627 of 309 F. 2d, the Court recognized the basic and necessary distinction between a "voluntary application for assignment system" and a "geographic school zoning assignment system," stating, "In other systems of assignment, as those based upon geographic school zoning, the wish of the individual may be, and usually is, immaterial. It is the essence of a voluntary system of racial separation." As we have indicated, appellants have no quarrel with the geographic school zoning system embraced in the Fort Smith plan of desegregation. Patricia Rogers resides within three blocks of Lincoln High School and within Lincoln's geographical attendance area. Under the plan she is required to attend Lincoln High School. To allow her to transfer would constitute discriminatory action in her favor,

would open the door to similar requests, and would weaken the stability of the entire geographic attendance area system. Compare Downs v. Board of Education of Kansas City, 336 F. 2d 988 (10 Cir. 1964), cert. denied 85 S. Ct. 898, where the Court very pertinently stated:

> "While there seems to be authority to support that contention,[9] the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools [125] and Negro children have no constitutional right to have white children attend school with them. (citing cases).
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> "'* * * "there is no affirmative U.S. Constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils."'" 336 F. 2d at p. 998.

Teacher issue.

[3] Desegregation of teachers is recognized as a part of the over-all desegregating process, and courts have been ordering districts to undertake teacher integration as a part of the total job of desegregating the schools. Pupils in grades that are integrated have standing to challenge faculty segregation, not necessarily for the purpose of protecting the constitutional rights of the teachers, but in

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[9] In Downs, appellants contended that even though the Board was not pursuing a policy of intentional segregation, there was still segregation in fact and that the Board was required to eliminate segregation in fact as well as segregation by intention.

order to insure that the pupils will not be discriminated against on the basis of their race. Hence, under proper circumstances pupils are within their rights in insisting that a teacher not be selected on the basis that the teacher's race corresponds to their own. See and compare Augustus v. Board of Public Instruction, 306 F. 2d 862 (5 Cir. 1962); Mapp v. Board of Education of Chattanooga, 319 F. 2d 571 (6 Cir. 1963); Northcross v. Board of Education of City of Memphis, 333 F. 2d 661 (6 Cir. 1964); Board of Public Instruction of Duval County, Fla. v. Braxton, 326 F. 2d 616 (5 Cir. 1964).

[4] Judge Miller refused to strike the allegation in the complaint which raised the assignment of teachers issue, holding that "[I]t might become material and require consideration if the question is raised by proper parties, * * * [and] in order to avoid a multiplicity of suits, the court will retain jurisdiction of the case in order that the question may be raised if any proper party desires to intervene." Appellants seem to regard the foregoing to mean that only a teacher has standing to challenge discrimination in teacher assignments. We do not so regard the holding and are not persuaded that Judge Miller so intended. The Court was familiar with the cases cited, supra, which stand for the proposition that pupils may have standing to litigate the issue. Seemingly, the Court was of the view that appellants were prematurely attacking the assignment of teachers for the reason that Patricia Rogers and others of her class are high school students who are attending grades not yet reached in the orderly progress of the plan of integration. We are in accord. Certainly if there is in fact discrimination being practiced in teacher selection, pupils who are directly

affected thereby, or the teachers themselves should be willing to intervene and seek a judicial determination of the question.

Moreover, in view of the good faith efforts of the Board and other school authorities to bring about complete integration, we are persuaded to hold that they should be afforded the initial opportunity of correcting the practice of employing teachers on a proscribed discriminatory basis, if in fact that practice prevails. If the Board and other school authorities fail or refuse to recognize and discharge their responsibility in this regard, we are confident that the trial court on motion or application of proper parties will accord the question prompt and effective consideration and will enter such order as the facts and circumstances justify and require.

Attorney's fee issue.

[5] Finally, appellants contend that the Court's error in approving the revised plan extends to its denial of their motion for attorney's fees orally made at the conclusion of the trial. Applicable here is the general rule that the award of counsel fees lies within the sound discretion of the trial court, but like other judicial discretion, it is subject to review. Bell v. School Board of Powhatan County, Virginia, 321 F. 2d 494 (4 Cir. 1963).

[6] Judge Miller accorded the question due consideration, 232 F. Supp. pp. [126] 843-844, and concluded that the "facts * * * do not justify the allowance * * *," and denied the motion. We have examined the question in the perspective of all the surrounding circumstances and are thoroughly convinced that there is no valid reason for hold-

ing that the Court's action resulted from an abuse of its discretion. The Bell case, supra, has vital and decisive distinguishing features. There the Court was obviously motivated by the "long continued pattern of evasion and obstruction which included not only the defendants' unyielding refusal to take any initiative, thus casting a heavy burden on the children and their parents, but their interposing a variety of administrative obstacles to thwart the valid wishes of the plaintiffs for a desegregated education."

In summary, therefore, we are satisfied that the action of the school authorities in their desegregation efforts "constitutes good faith implementation of the governing constitutional principles." Accordingly, the judgment must be and is affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17870

JANICE ROGERS, a Minor, Age 16, PATRICIA ROGERS, a Minor, Age 15, by Their Mother and Next Friend, Mrs. CORINE ROGERS,

Appellants,

vs.

DR. EDGAR F. PAUL, DR. ROGER BOST, JOHN M. YANTIS, BRUCE SHAW, JACK GROBER, DOUGLAS G. ROGERS, Board of Directors of Special School District of Fort Smith, Arkansas; CHRIS CORBIN, Superintendent of Schools of Special School District of Fort Smith, Arkansas; SPECIAL SCHOOL DISTRICT OF FORT SMITH, ARKANSAS, a Corporation.

APPEAL FROM the United States District Court for the Western District of Arkansas.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Arkansas and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

May 7, 1965.